

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOSEPH G. HALL and U.S. POSTAL SERVICE,
POST OFFICE, Flint, Mich.

*Docket No. 96-1725; Submitted on the Record;
Issued May 20, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's claim for further consideration on the merits of his claim under 5 U.S.C. § 8128(a) of the Federal Employees' Compensation Act, on the basis that his request for reconsideration was not timely filed within the one-year time limitation period set forth in 20 C.F.R. § 10.138(b)(2) and did not show clear evidence of error.

On January 27, 1992 appellant, a 36-year-old mail handler, filed a claim for a back and neck injury, due to lifting on the dock. Appellant was off work for two days. Based on an attending physician's report by Dr. Richard Meddalena, a family practitioner, the Office accepted appellant's claim for a cervical and lumbar strain under claim number A9-362543.

Following the acceptance of appellant's claim for a cervical and lumbar strain on January 27, 1992, the Office accepted that an earlier incident at work in the fall of 1987 resulted in a herniated disc, for which appellant had surgery. The Office had previously denied appellant's claim for an employment-related herniated disc, but upon subsequent review in February 1992, it accepted that appellant sustained a herniated disc due to lifting on November 9, 1987 under claim number A9-321498.

Following the January 1992 treatment, appellant next sought treatment in December 1992 for aggravated symptoms which he related to his work. Appellant stopped work on December 17, 1992 and sought treatment from Dr. Daniel Zelko, a Board-certified family practitioner, who referred him for physical therapy. Pursuant to his claim of a recurrence of total disability, appellant was paid wage-loss compensation. An electromyogram study performed on December 27, 1992 revealed "evidence of peroneal mononeuropathy, more on the left side than the right, most likely due to root compression at the level of L5." It was noted that this finding was consistent with the history of the previous herniated disc with laminectomy in 1988.

Appellant obtained further treatment one year later on January 3, 1993, from Dr. Manual Patricio, a family practitioner, who referred him to physical therapy. On February 11, 1994 appellant filed a claim for recurrence of total disability, for a three-week period between December 25 and January 14, 1993. Appellant alleged that while the physical therapy helped to improve his symptoms, he continued to have symptoms which at times disabled him. He related his continued condition to his accepted conditions of herniated disc and to his subsequent accepted lumbar strain in 1992. Appellant submitted a March 25, 1994 report from Dr. Patricio, who noted that he evaluated appellant twice per month since January 3, 1994.

The Office considered appellant's claim for a recurrence of total disability pursuant to the accepted lumbar strain under claim number A9-362543, and found by decision dated April 21, 1994, that the medical evidence did not establish a relationship between the three-week period of disability and the prior lumbar strain in January 1992. While the Office did consider appellant's claim for a recurrence of total disability due to the prior herniated disc, the Office referenced the acceptance of the herniated disc in its decision.

On April 25, 1994 the Office received diagnostic test results from February 2, 1994, ordered by Dr. Patricio. The record indicates that appellant was terminated from his position following recurrent back pain in the fall of 1994, at which time he sought further treatment. After undergoing further surgery in March 1995 for a diagnosed recurrent herniated disc, appellant requested reconsideration of the April 21, 1994 decision through his attorney by letter dated March 5, 1996. Appellant's attorney noted that the claimed recurrence had not been addressed with respect to the accepted herniated disc in 1987, and submitted additional evidence in the form of depositions from further attending physicians, to support a causal relationship between the prior herniation and surgery, and the condition since 1994. Appellant submitted a December 11, 1995 deposition from Dr. Wilbur Boike, a Board-certified neurosurgeon, who evaluated appellant in the fall of 1994 and diagnosed a recurrent herniated disc. He noted a history of a lack of back problems from the date of recovery in 1988 until 1991, and stated that he was unable based on appellant's history, to identify the precise date when appellant had herniated his disc again. Dr. Boike noted that it was "quite probable" that the herniation diagnosed in the fall of 1994 was due to his work duties. Appellant also submitted a January 29, 1996 deposition from Dr. Gregory P. Graziano, a Board-certified orthopedic surgeon, who performed two surgeries upon appellant in March 1994. Dr. Graziano stated that when he performed surgery, he found that the two bones had not fused together properly from the prior 1988 surgery, and there was scar tissue present instead of bone mass. He opined that appellant had not sustained a recurrent herniated disc, but that appellant's symptoms were due to the lack of a solid fusion from the surgery in 1988.

By decision dated March 22, 1996, the Office found that appellant's request for reconsideration was not within one year of its April 21, 1994 decision and that appellant had not established clear evidence of error with respect to his untimely request for reconsideration. The Office also combined the current claim A9-362543 with the prior claim A9-321498 into the latter claim number, and advised appellant that he could file a separate claim for a consequential injury due to the prior surgery.

The only decision before the Board on this appeal is the Office's March 22, 1996 decision which denied appellant's request for a review of the merits of his case because his request for review was not timely, and because it did not establish any evidence of error. Since more than one year elapsed from the April 21, 1994 decision, and the date of the filing of appellant's appeal on May 10, 1996, the Board lacks jurisdiction to review the prior decision.¹

The Board finds that the Office properly refused to reopen appellant's claim for further consideration on the merits of his claim under 5 U.S.C. § 8128(a) of the Act, on the basis that his request for reconsideration was not timely filed within the one-year time limitation period set forth in 20 C.F.R. § 10.138(b)(2) and did not show clear evidence of error.

Section 8128(a) of the Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

"The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

(1) end, decrease, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued."

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.138(b)(2) provides that "the Office will not review ... a decision denying or terminating a benefit unless the application is filed within one year of the date of that decision." The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).²

In the present case, the most recent merit decision by the Office was April 21, 1994. Appellant had one year from the date of this decision to request reconsideration, and did not do so until March 5, 1996. The Office properly determined that appellant's application for review was not timely filed within the one-year time limitation set forth in 20 C.F.R. § 10.138(b)(2).

The Office, however, may not deny an application for review based solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under 5 U.S.C. § 8128(a), when an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application shows "clear evidence of error" on the part of the Office.³ Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in

¹ See 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

² *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

³ *Charles J. Prudencio*, 41 ECAB 499 (1990); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

20 C.F.R. § 10.138(b)(2), if the claimant's application for review shows "clear evidence of error" on the part of the Office.⁴

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.⁵ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.⁶ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁷ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁸ This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.⁹ To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office decision.¹⁰ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.¹¹

In this case, appellant requested reconsideration of the April 21, 1994 decision. The record at the time of the Office's April 21, 1994 denial of his claim for a recurrence of total disability, showed that appellant sustained periodic back pain. Appellant was off for one week between Christmas and New Years, and then was off for two weeks following a January 3, 1994 evaluation with his family practitioner. With his request for reconsideration submitted in March 1996, appellant submitted new evidence to show that his continued condition, which necessitated surgery in March 1995, was due to his employment-related herniated disc or to surgery after his herniation. The Board notes that the Office reviewed the additional evidence in the context of the accepted lumbar strain on January 27, 1992, since that was the subject of the prior merit review on April 21, 1994. The Office, however, advised appellant that if he claimed a

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1996), states: "The term 'clear evidence of error' is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the Office made an error (for example, proof of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized medical report which, if submitted prior to the Office's denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of the case...."

⁵ See *Dean D. Beets*, 43 ECAB 1153 (1992).

⁶ See *Leona N. Travis*, 43 ECAB 227 (1991).

⁷ See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁸ See *Leona N. Travis*, *supra* note 6.

⁹ *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁰ *Leon D. Faidley, Jr.*, *supra* note 2.

¹¹ *Gregory Griffin*, *supra* note 3.

consequential injury resulting from the herniated disc or surgery, he could file a separate claim. Because of the lack of a final decision on the relationship between appellant's three-week disability from mid-December 1993 until mid-January 1994 and his 1988 surgery, the Board finds that it was proper for the Office to decline review of the evidence with respect to his prior surgery. The Board finds that the evidence does not establish clear evidence of error with respect to that three-week period of claimed disability, and that, therefore, the Office did not abuse its discretion in refusing to review the merits of appellant's claim.

The decision of the Office of Workers' Compensation Programs dated March 22, 1996 is hereby affirmed.

Dated, Washington, D.C.
May 20, 1998

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member